

TAKINGS LEGISLATION: A COMMENT

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Property-rights activists have backed two basic sorts of legislation to protect landowners from regulatory burdens. By the end of 1995, fourteen States had adopted the first type—a “takings assessment statute.”¹ An assessment statute requires a regulatory agency considering an action to prepare a written evaluation both of the action’s takings implications, and also of alternative actions that would mitigate takings problems. The second type—a “compensation statute”—articulates a test for identifying a regulatory taking, sets levels of compensation, and provides procedures for the settlement of claims. In 1995, Florida and Texas, two of the nation’s four most populous States, joined the short list of jurisdictions with compensation statutes.² The federal government also has been stirring. A 1988 Reagan Administration executive order requires federal agencies to conduct takings assessments.³ In addition, the House passed a narrow compensation statute in March 1995, and the Senate Judiciary Committee approved more far-reaching takings legislation in December 1995.⁴ The regulatory-takings issue has never been more legislatively salient.

In this Comment, I evaluate core features of the various takings acts. To provide focus, most of my examples involve the effects of endangered-species laws. I criticize some statutory

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1. John Tibbits, *Takings Laws Just Won't Die*, PLANNING, Feb. 1996, at 16. For fuller discussion, see Hertha L. Lund, *The Property Rights Movement and State Legislation*, in LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION 199 (Bruce Yandle ed., 1995).

2. See FLA. STAT. ANN. § 70.001 (West 1996); TEX. GOV'T CODE ANN. §§ 2007.001 to .026 (West 1996). Compensation statutes are analyzed in *Recent Legislation: Land-Use Regulation*, 109 HARV. L. REV. 542 (1995).

3. Exec. Order 12,690, 3 C.F.R. 554 (1988).

4. Omnibus Property Rights Act of 1995, H.R. 925, 104th Cong., 1st Sess. (1995); S. 605, 104th Cong., 1st Sess. (1995).

approaches and endorse others. My remarks build on William Fischel's characteristically thoughtful Article,⁵ which, while nominally focused on the political economy of the military draft, provides many insights into the issue of the taking of inanimate property.

I. THE INEXACT ANALOGY BETWEEN HIRING SOLDIERS AND COMPENSATING LANDOWNERS

Fischel chronicles the Pentagon's shift from draftees to volunteers. Although much of the military brass had opposed this reform, Fischel reports that they found that the shift dissipated anti-military sentiment and otherwise helped their cause. There is a lesson here for the environmentalists who so fervently oppose compensation bills. Enactment of compensatory legislation might instantly defang the property rights movement. Environmentalists could then redeploy their lobbying resources toward raising appropriations for compensatory payments, an outcome that would enable their favored agencies to accomplish more.

Fischel nicely mines the analogy between the voluntary army and compensation for regulatory takings. As he well knows, however, the remedies involved in these two cases are not identical. The familiar Calabresi-Melamed framework exposes the differences.⁶ Although draftees did receive some pay, the military draft basically protected the state with what Calabresi-Melamed call a "property rule."⁷ The creation of a volunteer army reversed this legal allocation and protected the *citizen* with a property rule. Today, anyone who regards military pay as too skimpy can simply refuse to enlist. The compensation bills that are now before Congress provide a different sort of remedy. They seek to provide a property owner with "liability rule" protection from a regulatory taking—that is, a right to recover

5. William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue*, 20 HARV. J.L. & PUB. POL'Y 23 (1996). See also GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978) (recurrently discussing dilemmas of military recruitment).

6. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

7. A property rule requires someone who wishes to remove an entitlement from its holder to purchase the entitlement in a voluntary transaction. The would-be purchaser has no legally-enforceable right to the entitlement should the holder refuse to sell. See *id.* at 1092.

damages, but not a power to stop the taking.⁸

The Calabresi-Melamed framework reveals two other important options that would be available if, for example, a federal agency were to seek to protect endangered species living on private habitat. First, following the Voluntary Army approach, Congress could adopt a Voluntary Habitat program. The agency could acquire habitat only from landowners who consented to sell their development rights; others who chose not to sell would be protected by a property rule from any government seizure. The U.S. Fish & Wildlife Service (FWS) employed this approach during the first stage of its endangered species efforts, which began in 1966.⁹ Voluntary acquisitions minimize coercion and litigation. The shortcoming of protecting landowners with a property rule, however, is that government may find it impossible to assemble all pieces of a unique habitat because some owners might strategically hold out. This is the rationale for governmental exercise of the power of eminent domain. Whether this rationale justifies coercion in a specific setting depends on the characteristics of the species and habitats at issue.

Less obviously, a legislature could empower a landowner to buy relief from an onerous regulation at a stated price. (This would be the famous “rule four” of the Calabresi-Melamed framework.) The FWS has been using a system of this sort in Travis County, Texas.¹⁰ The agency frees homebuilders who have contributed \$1,500 to a conservation fund from habitat restrictions designed to protect the golden-cheeked warbler. A kindred approach would entitle a regulatee to free a tract from a regulation by agreeing to submit to that regulation on equivalent, unregulated land. While the “rule four” approach would not entirely placate claimants who feel they have been abused, it would unequivocally empower them, at a price, to get government off their backs.

Lobbyists and legislators are likely to continue to focus on how, if at all, to protect landowners with a liability rule. They

8. A liability rule is also distinguishable from a property rule in that it is the state that sets the value of the entitlement, without considering the idiosyncratic value that the entitlement may have to its holder. *See id.* at 1092.

9. *See* Lee Ann Welch, *Property Rights Conflicts Under the Endangered Species Act*, in *LAND RIGHTS*, *supra* note 1, at 151, 153-58.

10. *See* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 *STAN. L. REV.* (forthcoming Apr. 1997).

should be alert to contexts where one of the alternative approaches just discussed would be preferable.

II. SOME DOUBTS ABOUT TAKINGS-ASSESSMENT LEGISLATION

I know little about how takings-assessment policies have worked in practice. Until those who know more persuade me otherwise, I urge property-rights advocates to drop this approach and instead concentrate on enacting compensation statutes. The main precedent for an assessment requirement is environmental-impact analysis. The history of the environmental-review process is not a promising one.

A. The Wisdom of Private Policing of Assessments

Who is to ensure that an agency conscientiously carries out its duty to make a takings assessment? This task could be assigned to another agency, such as the Office of Management and Budget. Some assessment statutes, however, authorize a private party to seek judicial enforcement of the assessment process. The Texas takings statute explicitly authorizes private suits,¹¹ and the reported Senate Bill includes language that hints that Congress intends this result.¹²

Lawmakers bent on enacting assessment legislation should explicitly state that private parties do *not* have standing to enforce the process. The experience under the California Environmental Quality Act (CEQA) illustrates the perils of allowing citizen suits.¹³ Although property-rights advocates might imagine that virtually all citizen suits would be brought by people who sympathize with the property-rights cause, the history of CEQA suggests otherwise. If private suits are permitted, numerous self-interested parties can be expected to invoke the process in order to delay government action otherwise widely viewed as desirable.

Suppose, for example, that Congress were to enact legislation that would disband the Commerce Department and require it to abandon its current headquarters on Constitution Avenue. If private suits were allowed, defenders of the Commerce

11. See TEX. GOV'T CODE § 2007.044 (West 1996).

12. See S. 605, *supra* note 4, at § 406.

13. See ROBERT C. ELLICKSON & A. DAN TARLOCK, LAND-USE CONTROLS 313-31 (1981).

Department might be able to use takings-assessment legislation to delay the shutdown. The defenders could arrange for a property owner—for example, Louie, the owner of a luncheonette that caters to Commerce Department patrons—to front for them. Louie might articulate the (legally absurd) claim that the closing of the building would effect a taking by reducing the value of his enterprise. If takings-assessment legislation were in effect, Louie's attorneys would have a number of arrows in their legal quiver. If the Commerce Department tried to close the building without preparing a takings assessment, Louie's lawyers could seek to enjoin the closure until an assessment had been prepared. Once an assessment *had been* prepared, Louie's lawyers could attack the "adequacy" of both the assessment and its consideration of alternatives. Even if Louie eventually were to lose all these claims, the history of CEQA suggests that he nevertheless might succeed in delaying the closure for many years while courts deliberated over the adequacy of the report.

Many other disquieting scenarios leap to mind, because all important governmental decisions inflict losses on someone. The holder of a television license might use assessment litigation to delay federal auctions of other portions of the electromagnetic spectrum. If the Environmental Protection Agency were to authorize the trading of emission permits, losers from that policy change might waylay it with an assessment lawsuit. Poverty lawyers could invoke the assessment process to delay the ending of the federal entitlement to welfare.

Those who draft an assessment statute can anticipate some of these abuses and include language designed to thwart them. Because there seems to be no sound way to structure citizen suits, however, an assessment statute should go further and flatly deny private litigants standing to enforce.

B. The Shortcomings of Information-Forcing

Moreover, I question the wisdom of *agency-enforced* takings-assessment policies. President Reagan's Executive Order attempts to make administrators sensitive to takings concerns by ensuring that takings information is available to them.¹⁴ This is an extremely indirect, and I suspect ineffective, way to control a

14. See Exec. Order 12,630, *supra* note 3.

bureaucracy. Why should a line agency make use of information that it thinks is irrelevant? Takings law is a muddle, and the costs and benefits involved in environmental protection actions are extremely difficult to quantify. For these and other reasons, takings-assessment reports are apt to make dreary reading. It is hardly surprising that Barton Thompson reports that they have degenerated into "cookie-cutter documents."¹⁵ An executive's straightforward method of controlling a bureaucracy is not to force information on unsound managers, but to appoint line executives dedicated to following appropriate policies.

I join the property-rights advocates in being generally skeptical of the relative institutional competence of government. But for some functions, such as the provision of public goods, government nonetheless may be the best institution at hand. Enough of the nation's scarce brain-power has already been wasted on environmental-impact assessments and the like. If takings assessments have little or no effect on agency actions, then requiring them just makes government bigger and slower. The Republican Congress should be reducing red tape, not adding to it.

III. TWO CHEERS FOR TARGETED COMPENSATION LEGISLATION

A well-designed compensation act docks an agency's budget to defray the costs of takings the agency inflicts. Unlike a boilerplate report, this threat is likely to make an agency snap to attention. Frank Michelman once urged legislatures to become more involved in the shaping of takings doctrine.¹⁶ Legislatures generally are better able than courts to deal with issues comprehensively, to impose numerical rules (something courts seem to regard as presumptively unjudicial), and to create new procedures for the processing of claims. However, the compensation bills pending in Congress contain a number of suspect provisions.

A. Attorneys' Fees

The Florida and Texas compensation statutes include even-

15. Thompson, *supra* note 10.

16. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 HARV. L. REV. 1165, 1167, 1245-57 (1967).

handed loser-pays rules for attorneys' fees.¹⁷ The bills pending in Congress, by contrast, would make government liable for attorneys' fees when it loses a takings suit but unable to collect attorneys' fees when it prevails.¹⁸ This asymmetric approach fails to recognize that government is not the sole source of evil; overzealous and meritless plaintiffs can also be pests. The Republican Congress is already addressing the problem of nuisance claims in the fields of shareholder derivative litigation, products liability law, and elsewhere. These claims could be deterred in the takings arena by a federal compensation statute that applied the loser-pays principle to all outcomes, no matter the identity of the winner.

B. Problems with Using Percentage Diminution in Value as a Takings Threshold

Most compensation legislation provides that a taking occurs when a regulation or other agency action reduces the market value of any portion of the claimant's property by more than a specified percentage, such as thirty-three percent.¹⁹ (The statutes typically also state that any reduction resulting from nuisance-preventing regulation is to be ignored.) One can sympathize with legislators who have sought to create a bright-line rule in this traditionally muddy legal context. Nonetheless, I offer two criticisms of the percentage-reduction approach and briefly sketch an alternative.

In practice, the percentage-reduction approach is unlikely to create as much predictability as its proponents have hoped. Appraisers who serve as expert witnesses in compensation cases commonly disagree because the market value of a particular piece of land depends on many variables. In addition, the compensation statutes themselves introduce new uncertainties. First, disputes will arise over the identity of the agency action at issue. For example, can a claimant accumulate the effects of a variety of government regulations in order to exceed the threshold? Second, in many contexts there will be battles over

17. See statutes cited *supra* note 2.

18. See bills cited *supra* note 4.

19. The Florida compensation statute is a notable exception. It defines a taking as an "inordinate burden" and attempts to flesh out the meaning of that phrase. See FLA. STAT. ANN. § 70.001(3)(e) (West 1996).

what constitutes a "portion" of the claimant's property.²⁰ When building-code officials require a museum to install an elevator for wheel-chair visitors, is the affected portion of the museum just the elevator shaft? Is time a dimension in which property interests can be sliced? If so, a one-month regulatory delay commonly would represent the 100% destruction of a one-month interest.

More fundamentally, a percentage threshold poorly reflects the fairness concerns that underlie takings law. Takings clauses largely aim to prevent horizontal inequity stemming from a government's decision to impose a heavy burden on a few citizens instead of spreading that burden through the tax system. The percentage-reduction approach poorly captures this concern.

What would be better? First, takings litigation should be structured into a *prima facie* case, to be pleaded and proved by a claimant, and a set of defenses, to be pleaded and proved by government. This is the structure used in mature doctrinal areas such as tort law and criminal law.

Any land use activity can be appraised in terms of its relative desirability to neighbors. The *prima facie* case for a taking should be that a landowner has suffered loss by being barred from undertaking land uses whose externalities persons in the region consider to be no worse than normal. Landowners have a particularly poignant "why me?" complaint when they are prohibited from doing what many of their neighbors are permitted to do. Compensation should be measured only by the diminution in land value that stems from the prohibition of normal (or better) activities, and no compensation should be awarded for any diminution of value resulting from the prohibition of subnormal activities.²¹

Endangered species protection can provide a simple illustration of the suggested approach. Suppose that there are two wheat farmers, X and Y, in a region where wheat farming is a normal and neighborly land use. After an endangered gopher is discovered on the fields of Farmer X, a wildlife agency prohibits the raising of wheat on that land. Farmer X could

20. Takings scholars refer to this as the "denominator" problem. The issue was nicely posed in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

21. As Fischel observes, in a prior article I applied this approach to large-lot zoning requirements. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 418-24, 489-98 (1977).

handily make out the proposed *prima facie* case for a taking and, if ultimately successful, would be entitled to recover any diminution in market value that the prohibition caused, even if that drop were to happen to be less than, say, thirty-three percent.

Farmer Y is in a different situation. An unmined deposit of coal is located near the surface of Farmer Y's land. This coal can be economically extracted only by means of strip-mining. While strip-mining would not constitute a nuisance in the region in question, the activity would be unusual and area residents would regard it as relatively unneighborly because of its undesirable spillover effects. When another species of endangered gopher is discovered on Farmer Y's land, the wildlife agency forbids future strip-mining on Y's land, but does not interfere with ordinary wheat farming. The regulatory intervention reduces the value of the Y's land by sixty percent because the coal deposit is valuable. Although Y's percentage loss may be greater than X's, Y has a far weaker horizontal equity argument because the regulation has not denied him a right to raise wheat, the normal activity for the region.

Finally, once a claimant has made out a *prima facie* case for a taking, the government should be entitled to attempt to prove as a defense that, in the long run, a practice of compensating in instances of this sort would not be in the interest of claimants in general. In the case of Farmer X, this defense should fail. It might succeed, however, in an instance where the regulation in question was unquestionably socially desirable and the transaction costs of rendering payment would be grotesque. The defense should be honored, for example, if a state were to enact a *statewide* ban on wheat farming for one year to allow nature to remedy the effects of the previous year's dust bowl.

C. The Case for Targeted Compensation Legislation

Compensation legislation may be written to apply globally to all agencies, or selectively to a few. The Florida and Texas statutes,²² which cover most state and local actions, are global, as is Title II of the Senate Bill,²³ which would govern actions of

22. See statutes cited *supra* note 2.

23. See S. 605, *supra* note 4.

most federal agencies. By contrast, the House Bill²⁴ and Title V of the Senate Bill target only a handful of federal programs, among them the Endangered Species Act. I recommend the targeted approach.

There are many uncertainties about how compensation legislation will work in practice:

1. *Agency behavior.* Will bureaucrats be oblivious to monetary penalties, however structured? Conversely, will compensation requirements make agencies *overly* cautious? To apply Fischel's more precise terminology, to what extent will compensation reduce the substitution and misallocation costs created when an agency is not liable for the losses it inflicts?²⁵

2. *Landowner behavior.* How much will a compensation statute lessen landowners' current propensity to engage in premature development in order to stay one step ahead of regulators? Conversely, because of moral hazard, will a policy of compensation spur landowners to make additional wasteful improvements?

3. *Claimant and trial-lawyer behavior.* How many claims will there be and what administrative burdens will they impose? Can rules about attorneys' fees, and other such mechanisms, lessen the risks of frivolous and fraudulent claims?

In sum, I have great sympathy for many of the takings complaints that federal actions have engendered. Nevertheless, the uncertainties just listed suggest that Congress would be wise to proceed selectively, not globally. By targeting reforms at a few of the most potentially abusive programs, Congress could not only remedy the worst injustices but also initiate an experiment.²⁶ Although the results of social-science experiments are almost invariably contested, a selective statute would likely expose the baselessness of certain arguments put forward in the ongoing debate over property-rights legislation. Perhaps the experiment would be so plainly successful that Congress could eventually broaden the scope of the compensation legislation with little controversy. If so, the takings question, like the draft before it, would vanish from the national political agenda.

24. See H.R. 925, *supra* note 4.

25. For an explanation of these costs, see Fischel, *supra* note 5, at 29-39.

26. Because federal institutions differ in some respects from state and local ones, experience under state compensation statutes may not necessarily be instructive about appropriate federal policy.